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LING PEEK HOE & ANOR v. DING SIEW CHING & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF PCA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
B ABU SAMAH NORDIN FCJ
RAMLY ALI FCJ
ZAHARAH IBRAHIM FCJ
[CIVIL APPEALS NO: 02(f)-23-04-2016 (A)
& 02(f)-24-04-2016 (A)]
C 20 JUNE 2017

CIVIL PROCEDURE: *Fraud – Standard of proof – Civil action – Whether plaintiffs proved case on balance of probabilities – Whether Court of Appeal correct in applying test of proof beyond reasonable doubt – Doctrine of prospective overruling* D *– Whether applied to all pending cases and cases under appeal – Whether future cases should mean only cases yet to be filed in courts – Whether present case a live case – Whether appeal process had not yet been exhausted – Whether irresistible conclusion test similar to beyond reasonable doubt test – Whether plaintiffs only required to prove case on balance of probabilities – Sinnaiyah & Sons Sdn Bhd* E *v. Damai Setia Sdn Bhd*

EVIDENCE: *Proof – Standard of proof – Civil action – Whether plaintiffs proved case on balance of probabilities – Whether Court of Appeal correct in applying test of proof beyond reasonable doubt – Doctrine of prospective overruling – Whether applied to all pending cases and cases under appeal – Whether future cases should* F *mean only cases yet to be filed in courts – Whether present case a live case – Whether appeal process had not yet been exhausted – Whether irresistible conclusion test similar to beyond reasonable doubt test – Whether plaintiffs only required to prove case on balance of probabilities – Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd*

G The first plaintiff was the registered owner of a shop house and two pieces of agricultural land ('the three properties'). The first defendant was an advocate and solicitor while the second defendant was a licensed money lending company. In 1995, the first plaintiff had obtained a loan facility of RM590,000 from Hong Leong Bank Berhad ('HLBB') and charged the three H properties as securities for loan. In 1996, the first plaintiff had approached the second defendant's office for a loan. The first plaintiff was asked to furnish original copy of title documents of the three properties and was informed that the second defendant had the right to keep those title documents until the first plaintiff fully paid his loans. Subsequently, the first I plaintiff was in arrears of the HLBB loan payment. The defendants settled the first plaintiff's HLBB loan and discharged the charges on the three properties. In 2003, the first plaintiff discovered that the three properties had been

transferred to the third, fourth and fifth defendants by virtue of some sale and purchase agreements. Documentation for all the loans and transfers was handled by the first defendant. The plaintiffs thus commenced an action against all the defendants for, *inter alia* (i) an order to declare that the sale and purchase agreements of three pieces of properties, and the tenancy agreements and transfers of those properties were null and void; and (ii) damages against the first defendant for failure to exercise reasonable professional care, skills and diligence ('suit 203'). The Judicial Commissioner ('JC') allowed suit 203 and the defendants were ordered to pay the plaintiffs damages. Aggrieved, the defendants appealed to the Court of Appeal. The Court of Appeal allowed the appeals by the defendants with costs and set aside the orders of the JC. The plaintiffs, however, successfully obtained leave to appeal to this court on the following questions (i) whether in light of the recent Federal Court decision in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* ('*Sinnaiyah*'), the Court of Appeal was right in adopting beyond reasonable doubt as the standard of proof for civil claim ('question 1'). It was contended that the plaintiffs had proven their case on the balance of probabilities as required by the law in *Sinnaiyah* and that the Court of Appeal had erred in applying the test of proof beyond reasonable doubt in this case since the principle in *Sinnaiyah* still applied despite being ruled to have only a prospective overruling on future cases. According to the plaintiffs, this case was still a live case, in that, its appeal process had not yet been exhausted when *Sinnaiyah* was decided; and (ii) whether irresistible conclusion was not the same as beyond reasonable doubt ('question 2').

Held (allowing appeal)

Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) The rationale on the applicability of the doctrine of prospective overruling as discussed by the Indian Supreme Court in the cases of *Sarwan Kumar v. Madan Lal Aggrawal* and *Golak Nath v. State of Punjab ('Sarwan Kumar')* was logical and sound. Thus, 'the law declared by the court applies to the cases arising in future only and its applicability to cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence.' The emphasis was on future cases and it did not affect cases that had attained finality. Although the word finality was not further explained in *Sarwan Kumar*, this court was of the view it could only mean those cases that had already exhausted their appeal process within the court system. (paras 27-29)

(2) Accordingly, within the jurisdiction, the law as declared by this court and made subject to the doctrine of prospective overruling, applied to all pending cases and all those cases still under appeal within the court system. As such, this court could not subscribe to the argument that

A future cases should mean only those cases yet to be filed with the courts. Question 1 was therefore answered in the negative. In respect of question 2, the 'irresistible conclusion' test is the same as the 'beyond reasonable doubt' test (*Jayaraman & Ors v. PP).* (paras 30-32)

B **(3)** The JC came to the 'irresistible conclusion' that the first plaintiff had succeeded in proving his case, that was, on the assertions of misrepresentation, fraud or conspiracy to defraud. In other words, the JC relied on a much higher test for the plaintiffs to prove their case and he found them to have done so when in law the plaintiffs were only required to prove their case on the balance of probabilities. At any rate,
C since even on the higher test the JC found for the plaintiffs to have proved their case, it was therefore obvious that had the JC applied the lower standard, that was, on the balance of probabilities, he would have definitely ruled that the plaintiffs had proved their case. (paras 34 & 35)

D **(4)** The Court of Appeal, in allowing the appeals by the defendants and setting aside the judgment and orders of the JC, premised its decision mainly on the erroneous use of the phrase or words by the JC to describe the test he relied upon to find for the plaintiffs. There was hardly any discussion on the quality and sufficiency of the evidence adduced by the plaintiffs to prove their case. Neither was there any finding on whether
E the defendants had rebutted the evidence adduced so as to justify the dismissal of the assertions by the plaintiffs of misrepresentation, fraud or conspiracy to defraud on the part of the defendants. Thus, the judgment of the Court of Appeal was set aside and the judgment and orders of the JC was restored. (paras 36 & 37)

F ***Bahasa Malaysia*** *Headnotes*

Plaintiff pertama adalah pemilik berdaftar sebuah rumah kedai dan dua bidang tanah pertanian ('tiga hartanah'). Defendan pertama adalah peguam bela dan peguam cara manakala defendan kedua adalah sebuah syarikat pemberi pinjaman wang berlesen. Pada tahun 1995, plaintif pertama telah
G memperolehi kemudahan pinjaman berjumlah RM590,000 daripada Hong Leong Bank Berhad ('HLBB') dan menggadaikan tiga hartanah itu sebagai cagaran untuk pinjaman. Pada 1996, plaintif pertama telah ke pejabat defendan kedua untuk mendapatkan pinjaman. Plaintif pertama diminta memberi dokumen asal tiga hartanah itu dan dimaklumkan bahawa defendan
H kedua akan menyimpan dokumen-dokumen tersebut sehingga plaintif pertama selesai membayar pinjaman. Kemudian, plaintif pertama ingkar dalam bayaran pinjaman HLBB. Defendan-defendan menyelesaikan pinjaman HLBB plaintif pertama dan melepaskan gadaian atas ketiga-tiga hartanah itu. Pada tahun 2003, plaintif pertama mendapati bahawa tiga
I hartanah itu dipindah milik kepada defendan ketiga, keempat dan kelima melalui beberapa perjanjian jual beli. Dokumentasi untuk semua pinjaman

dan pindah milik diuruskan oleh defendan pertama. Plaintif-plaintif, oleh itu, memulakan tindakan terhadap defendan-defendan untuk, antara lain (i) satu perintah mengisytiharkan perjanjian jual beli tiga hartanah tersebut, dan perjanjian sewa dan pindah milik hartanah-hartanah tersebut terbatal dan tidak sah; dan (ii) ganti rugi terhadap defendan pertama atas kegagalannya melaksanakan jagaan profesional, kemahiran dan kebolehan yang munasabah ('guaman 203'). Pesuruhjaya Kehakiman ('PK') membenarkan guaman 203 dan defendan-defendan diperintahkan membayar plaintif-plaintif ganti rugi. Terkilan, defendan-defendan merayu ke Mahkamah Rayuan. Mahkamah Rayuan membenarkan rayuan defendan-defendan dengan kos dan mengetepikan perintah PK. Perayu-perayu, walau bagaimanapun, berjaya memperoleh kebenaran untuk merayu ke mahkamah ini atas soalan-soalan berikut (i) sama ada mengambil kira keputusan dalam kes Mahkamah Persekutuan terkini *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* ('*Sinnaiyah*'), Mahkamah Rayuan betul dalam mengguna pakai ujian melampaui keraguan munasabah sebagai standard bukti untuk tuntutan sivil ('soalan 1'). Dihujahkan bahawa plaintif-plaintif telah membuktikan kes atas imbangan kebarangkalian seperti yang dikehendaki oleh undang-undang dalam kes *Sinnaiyah* dan bahawa Mahkamah Rayuan terkhilaf dalam mengguna pakai ujian melampaui keraguan munasabah dalam kes ini kerana prinsip dalam *Sinnaiyah* masih diguna pakai walaupun diperintahkan sebagai hanya mempunyai penolakan prospektif atas kes-kes masa hadapan. Menurut plaintif-plaintif, kes ini masih hidup kerana proses rayuan belum lagi selesai apabila *Sinnaiyah* diputuskan; dan (ii) sama ada kesimpulan yang tidak boleh disangkal tidak sama dengan melampaui keraguan munasabah ('soalan 2').

Diputuskan (membenarkan rayuan)

Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Rasional mengenai keterpakaian doktrin penolakan prospektif seperti yang dibincangkan dalam kes-kes Mahkamah Agung India *Sarwan Kumar v. Madan Lal Aggrawal* dan *Golak Nath v. State of Punjab* (*'Sarwan Kumar'*) adalah logik dan berwibawa. Oleh itu, 'the law declared by the court applies to the cases arising in future only and its applicability to cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence.' Penekanan adalah pada kes-kes masa hadapan dan ini tidak menjejaskan kes-kes yang telah mencapai matlamat. Walaupun perkataan matlamat tidak diperjelaskan dengan lebih lanjut dalam *Sarwan Kumar*, mahkamah ini berpendapat bahawa bermaksud hanya kes-kes yang telah menggunakan kesemua proses rayuan dalam sistem mahkamah.

(2) Dengan itu, menurut bidang kuasa, undang-undang seperti yang diisytiharkan oleh mahkamah ini dan tertakluk pada doktrin penolakan prospektif diguna pakai ke atas semua kes yang masih berjalan dan semua kes-kes yang masih dalam proses rayuan dalam sistem

mahkamah. Oleh itu, mahkamah ini tidak boleh menerima hujahan bahawa kes-kes masa hadapan hanya bermaksud kes-kes yang masih belum difailkan di mahkamah. Soalan 1 dengan itu dijawab secara negatif. Berkenaan soalan 2, ujian 'kesimpulan yang tidak boleh disangkal' adalah sama dengan 'melampaui keraguan munasabah'. (*Jayaraman & Ors v. PP*).

(3) Pesuruhjaya Kehakiman membuat 'kesimpulan yang tidak boleh disangkal' bahawa plaintif pertama berjaya membuktikan kesnya, iaitu, atas dakwaan salah nyataan, penipuan atau konspirasi untuk menipu. Dalam erti kata lain, PK bergantung pada ujian yang lebih tinggi untuk plaintif-plaintif membuktikan kes dan beliau memutuskan bahawa mereka berjaya berbuat demikian bila mana undang-undang hanya memerlukan plaintif membuktikan kes atas imbangan kebarangkalian. Walau bagaimanapun, oleh kerana atas ujian yang lebih tinggi PK mendapati plaintif-plaintif berjaya membuktikan kes, jelas bahawa jika PK menggunakan standard yang lebih rendah, iaitu, atas imbangan kebarangkalian, beliau akan memutuskan bahawa plaintif-plaintif telah membuktikan kes.

(4) Mahkamah Rayuan, dalam membenarkan rayuan-rayuan oleh defendan-defendan dan mengetepikan penghakiman dan perintah-perintah PK, mengasaskan keputusan terutamanya atas salah guna frasa atau perkataan oleh PK untuk menghuraikan ujian yang beliau gunakan untuk memihak pada plaintif-plaintif. Tiada perbincangan atas kualiti dan kecukupan keterangan yang dikemukakan oleh plaintif-plaintif bagi membuktikan kes mereka. Juga tiada apa-apa dapatan sama ada defendan-defendan telah menyangkal keterangan yang dikemukakan bagi menjustifikasikan penolakan kenyataan-kenyataan plaintif berkenaan salah nyataan, penipuan atau konspirasi untuk menipu dari pihak defendan-defendan. Oleh itu, penghakiman Mahkamah Rayuan diketepikan dan penghakiman dan perintah PK dikembalikan.

Case(s) referred to:

Golak Nath v. State of Punjab [1967] AIR 1643 SC ***(refd)***

Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 FC ***(refd)***

JCT Limited v. Muniandy Nadasan & Ors and Another Appeal [2016] 3 CLJ 692 CA ***(refd)***

PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***

Sarwan Kumar v. Madan Lal Aggrawal AIR 2003 SC 1475 ***(foll)***

Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***

(Civil Appeal No: 02(f)-23-04-2016 (A))

For the appellant - Wong Chong Wah, Wong Chun Keat, Hong Chong Hang & Edmund Lim Yun; M/s Hong Chew King & Co

For the respondent - A Iruthaya Raj; M/s Raj Selva & Co

(Civil Appeal No: 02(f)-24-04-2016 (A))
For the appellant - Wong Chong Wah, Wong Chun Keat, Hong Chong Hang & Edmund Lim Yun; M/s Hong Chew King & Co
For the respondent - Joseph Yeo, M Yunus Ali & Norazali Nordin; M/s Yunus Ali & Kam

[Editor's note: Appeal from Court of Appeal; Civil Appeal No: A-02-102-01-2013, A-02-2975-12-2012, A-02(IM)-1147-05-2013 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Richard Malanjum (CJ Sabah & Sarawak):

Preliminary

[1] For convenience, in this judgment, unless otherwise stated, the parties are referred to as they were at the High Court. The first and second appellants are referred to as the first and second plaintiffs or collectively as 'the plaintiffs'. As for the respondents, Ding Siew Ching, Golden Star, Ding Toh Biew, Ding Toh Gien and Ding Toh Lei are referred to individually as the first, second, third, fourth and fifth defendants respectively or collectively as 'the defendants'.

[2] On 18 August 2006, the plaintiffs commenced an action against the fifth defendants for, *inter alia*, (i) an order to declare that the sale and purchase agreements of three pieces of properties, and the tenancy agreements and transfers of those properties, were null and void and (ii) damages against the first defendant for failure to exercise reasonable professional care, skills and diligence (the main suit – suit 203).

[3] The third, fourth and fifth defendants then filed a claim against the first plaintiff in 2008, for injunction and damages for trespass (suit 45).

[4] Suit 203 and suit 45 were consolidated on 24 February 2010. Suit 203 was allowed by the learned Judicial Commissioner (JC). Hence, the sale and purchase agreement (S&P) and transfers of the three properties were declared null and void. Suit 45 was dismissed.

[5] The defendants were aggrieved by the High Court's decision and appealed to the Court of Appeal. Upon hearing the parties and after perusing the appeal records, the defendants' appeal was allowed with costs.

[6] The appellants successfully obtained leave to appeal to this court on 28 March 2016 on the following questions ('leave questions'):

(i) Whether in light of the recent Federal Court of Malaysia's decision in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584, the Court of Appeal was right in adopting beyond reasonable doubt as the standard of proof for civil claim?; and

(ii) Whether irresistible conclusion is not the same as beyond reasonable doubt?

[7] Appeal to this court centred against the decision of the High Court allowing suit 203 and the consequential orders made thereon and on the dismissal of suit 45.

Background Facts

[8] The first plaintiff was the registered owner of a shop house at No. 59, Taman Ilmu, Setiawan (No. 59 Shophouse) and two pieces of agricultural land located at Kg. Selamat (Kg Selamat properties). These properties will collectively be referred to as the 'three properties'. The second plaintiff is the first plaintiff's son.

[9] The first defendant is an advocate and solicitor practising in Messrs. Ding & Co. in Setiawan, Perak. The second defendant is a licensed money lending company while the third, fourth and fifth defendants are partners of the second defendant. The first, third, fourth and fifth defendants are siblings.

[10] In 1995, the first plaintiff obtained a loan facility of RM590,000 from Hong Leong Bank Berhad (HLBB) and charged the three properties and his house at No. 27, Jalan Raja Omar (Jalan Raja Omar property) as securities for the loan.

[11] In mid-1996, the first plaintiff approached the second defendant's office for a loan, through the third defendant. For the purpose of the loan, the first plaintiff was asked to furnish original copy of title documents of the three properties and was informed that the second defendant had the right to keep those title documents until the first plaintiff fully paid his loans. The first plaintiff was also asked to sign a stack of documents and to pay RM150 as legal fees. The third defendant represented to the first plaintiff that those documents and the legal fees were for the loan obtained from the second defendant. The third defendant then issued a RM5,000 cheque to the first plaintiff. Interest on the loan was agreed at 4% per month. The first plaintiff took a few more loans from the second defendant.

[12] The first plaintiff was in arrears of the HLBB loan payment. Around the end of 1996, the first plaintiff sold the Jalan Raja Omar Property to regularise payments of the HLBB loan. HLBB received RM330,000 as part payment of the first plaintiff's loan with HLBB.

[13] The defendants had settled the first plaintiff's HLBB loan and discharged the charges on the three properties. In 2003, the first plaintiff discovered that the three properties had been transferred to the third, fourth and fifth defendants by virtue of some sale and purchase agreements. Documentation for all the loans and transfers was handled by the first defendant.

[14] In the same year, the first plaintiff had to borrow money from a bank to repurchase No. 59 Shophouse for RM330,000, the premises where the first plaintiff and his family lived. No. 59 Shophouse was transferred into the second plaintiff's name. Again, documentation relating to the transfer was handled by the first defendant.

[15] The plaintiffs filed a suit against all the defendants for a declaration that the sale and purchase agreements and the transfer of the three properties were null and void. In essence, the plaintiffs' case was based on misrepresentation, fraud or conspiracy to defraud.

[16] The first plaintiff maintained that:

(a) The documents he signed in 1996 were loan documents;

(b) The defendants had wrongfully settled the first plaintiff's HLBB loan and redeemed the three properties without his knowledge or consent;

(c) The defendants misrepresented and misled the first plaintiff into believing that the loan transaction had given the defendants rights to retain the original documents of title of the three properties until the loans were fully settled and to discharge charges on the three properties;

(d) The three properties were unlawfully transferred to the third, fourth and fifth defendants;

(e) The first defendant had failed to exercise all reasonable professional care, skill and diligence and that she had breached the terms of her retainer with the first plaintiff when she failed to advise the first plaintiff properly on the documents signed by the first plaintiff (ie, loan documents/sale and purchase in 1996 and the transaction to re-purchase No. 59 Shophouse in 2003).

Decision Of The High Court

[17] After a full trial the learned JC found that the first plaintiff and the second defendant had money lending relationship and not that of a sale and purchase. The learned JC ruled that there was an 'irresistible conclusion' that the first plaintiff had succeeded in proving his case based on the following findings:

(a) The first plaintiff signed the documents under an impression that they were loan documents when in fact they were sale and purchase documents;

(b) The transfers of the three properties to the third, fourth and fifth defendants were made without the knowledge and consent of the first plaintiff;

(c) The first and third defendants were in a relationship of active confidence to the first plaintiff;

(d) The first and third defendants imposed an undue influence on the first plaintiff causing him to sign the sale and purchase documents.

[18] The learned JC decided for the plaintiffs and declared that the transfers of the three properties were null and void. The defendants were ordered to pay the plaintiffs general, special, punitive and exemplary damages. The learned JC then ordered that the defendants' counterclaim be dismissed with costs.

Decision Of The Court Of Appeal

[19] The Court of Appeal allowed all the three appeals by the defendants with costs and set aside the orders of the learned JC. In its judgment delivered by Vernon Ong Lam Kiat JCA, the Court of Appeal held that:

> [32] We have perused the appeal records and the grounds of judgment of the learned JC. We are constrained to agree with the submission of the Defendants that the learned JC erred in applying the wrong standard of proof in holding that the Plaintiffs had proven their case against the Defendants for fraudulent misrepresentation and/or fraud in impugning the title in respect of the three Properties.
>
> [33] Our finding is premised on the learned JC's oral decision and in his written judgment where he employed two different tests, ie, the balance of probabilities and the "irresistible conclusion" tests, both of which are not the correct tests in proving fraudulent misrepresentation and/or fraud. The learned JC ought to have used the beyond reasonable doubt test. On this ground alone, being an error of law, the appeal ought to succeed.
>
> [34] Secondly, in any event, even after subjecting all the evidence by using the beyond reasonable doubt test, we are of the view that the Plaintiffs have failed to prove fraudulent misrepresentation and or fraud beyond reasonable doubt.
>
> [35] Thirdly, we are also of the view that the learned JC had decided on an unpleaded issue, ie, undue influence that was never pleaded by the Plaintiffs. The learned JC had therefore misdirected himself on the law which misdirection had occasioned a prejudice against the Defendants.

Submissions Before The Federal Court

[20] Learned counsel for the plaintiffs submitted that the plaintiffs instituted the main suit 203 against the defendants based on misrepresentation, fraud and conspiracy to defraud that resulted in the three properties being unlawfully transferred to the defendants.

[21] And it was thus contended that the plaintiffs had proved their case on the balance of probabilities as required by the law expressed in the recent decision of this court in *Sinnaiyah* case *(supra)*. It was also argued that the

Court of Appeal erred in applying the test of proof beyond reasonable doubt in this case since the principle in *Sinnaiyah* case *(supra)* still applies despite being ruled to have only a prospective overruling on future cases. The reason is that this case is still a live case in that its appeal process had not yet been exhausted when the *Sinnaiyah* case *(supra)* was decided. What then encompasses 'future cases' has led to leave question 1.

[22] Learned counsel cited to us the Court of Appeal decision in *JCT Limited v. Muniandy Nadasan & Ors and Another Appeal* [2016] 3 CLJ 692 to support his contention. In that case the Court of Appeal said this:

> [71] We are of the view that the proper standard of proof, required to be proved as stated by the apex court in the *Sinnaiyah* case *(supra)* in a civil case involving allegation of fraud is applicable to this case. This is because this case, being an on-going appeal, is therefore, still a 'live' case, as opposed to those cases which had been finally adjudicated in terms of their final appeals. To our mind, that was what the apex court had meant when it said that the ruling did not have a retrospective effect. It does not apply to cases that had been finally decided. It is our considered view that all cases pending disposal in the appeal courts would qualify as 'future' cases referred to in the *Sinnaiyah* case *(supra)* because it would be incongruous indeed for the appeal courts to apply a wrong law in deciding those cases which final fate have not yet been finally determined. All cases which are pending disposal of their appeals, are therefore included in the so-called 'future cases' in the *Sinnaiyah* case *(supra)* ...

[23] For the reason above, learned counsel for the plaintiffs submitted that the answer to question 1 should be in the negative.

[24] Now, at times, an apex court within the judicial system of a country does enunciate a principle of law in one case before it that may seem to overrule an existing principle that has been applied to earlier cases. However, in coming up with such a principle the court would pronounce that such principle would only apply to future cases, that is, it would have a prospective overruling effect.

[25] The rationale of the principle of prospective overruling was clarified by the Indian Supreme Court in the case of *Sarwan Kumar v. Madan Lal Aggrawal* AIR 2003 SC 1475 at p. 1481 in these words:

> 13 ... Under the doctrine of "prospective overruling" the law declared by the Court applies to the cases arising in future only and its applicability to cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. Invocation of doctrine of "prospective overruling" is left to the discretion of the Court to mould with the justice of the cause or the matter before the Court.

[26] In an earlier case of *Golak Nath v. State of Punjab* AIR 1967 SC 1643 when the doctrine of prospective overruling was first considered and applied in India, the Indian Supreme Court said this at p. 1668:

A (47) Let us now consider some of the objections to this doctrine. The objections are: (1) the doctrine involved legislation by courts; (2) it would not encourage parties to prefer appeals as they would not get any benefit therefrom; (3) the declaration for the future would only be obiter; (4) it is not a desirable change; and (5) the doctrine of retroactivity serves as a break on courts which otherwise might be tempted to be so facile in
B overruling. But in our view, these objections are not insurmountable. If a court can overrule its earlier decision – there cannot be any dispute now that the court can do so – there cannot be any valid reason why it should not restrict its ruling to the future and not to the past. Even if the party filing an appeal may not be benefited by it, in similar appeals which he may file after the change in the law he will have the benefit. The decision
C cannot be *obiter* for what the court in effect does is to declare the law but on the basis of another doctrine restricts its scope. Stability in the law does not mean that injustice shall be perpetuated.

[27] We are of the view that the rationale on the applicability of the doctrine of prospective overruling as discussed by the Indian Supreme Court in
D the above cases is logical and sound. We have no good reason not to adopt it.

[28] Thus, 'the law declared by the court applies to the cases arising in future only and its applicability to cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted
E to its existence'. The emphasis is on future cases and it does not affect cases that have attained finality. In fact, a similar sentiment was expressed by our then Supreme Court in *PP v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284; [1987] 2 MLJ 311 when in applying the doctrine of prospective overruling justified it 'so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which
F had taken place under the section prior to the date of our judgment in this matter would remain undisturbed and not be affected'.

[29] And although the word finality was not further explained in *Sarwan Kumar (supra)*, we hold the view that it could only mean those cases that have
G already exhausted their appeal process within the court system.

[30] Accordingly, within our jurisdiction, we are therefore of the view that the law as declared by this court and made subject to the doctrine of prospective overruling applies to all pending cases and all those cases still under appeals within our court system. As such we cannot subscribe to the
H argument that future cases should mean only those cases yet to be filed with the courts.

[31] For the above reasons, we are therefore inclined to answer leave question 1 in the negative.

I

[32] In respect of leave question 2, we are of the view that the 'irresistible conclusion' test is the same as the 'beyond reasonable doubt' test. This court had in fact already made such an observation in the case of *Jayaraman Velayuthan & Ors v. PP* [1982] CLJ 464; [1982] CLJ (Rep) 130; [1982] 2 MLJ 306, *albeit* a criminal case but nevertheless relevant and applicable, when it said this at p. 137 (CLJ); p. 310 (MLJ):

> In our view, the irresistible conclusion test only seems to place on the prosecution a higher burden of proof than in a case where it depends on direct evidence, for in fact to apply the one and only irresistible conclusion test is another way of saying that the prosecution must prove the guilt of the accused beyond reasonable doubt.

[33] Having answered the two leave questions, it remains for us now to consider, bearing in mind the nature and basis of the claims of the plaintiffs, what should have been the correct outcome of suit 203 had the courts below applied the correct test as enunciated in *Sinnaiyah* case *(supra)*.

[34] The learned JC came to the 'irresistible conclusion' that the first plaintiff had succeeded in proving his case, that is, on the assertions of misrepresentation, fraud or conspiracy to defraud. In other words, the learned JC relied on a much higher test (since we agree that 'irresistible conclusion' is the same as 'beyond reasonable doubt' test) for the plaintiffs to prove their case and he found them to have done so when in law the plaintiffs were only required to prove their case on the balance of probabilities.

[35] At any rate, since even on the higher test the learned JC found for the first plaintiff, and hence that included the other plaintiff, to have proved their case, it is therefore obvious that had the learned JC applied the lower standard, that is, on the balance of probabilities, he would have definitely ruled that the plaintiffs had proved their case.

[36] We note that the Court of Appeal in allowing the appeals by the defendants and setting aside the judgment and orders of the learned JC premised its decision mainly on the erroneous use of the phrase or words by the learned JC to describe the test he relied upon to find for the plaintiffs. There was hardly any discussion on the quality and sufficiency of the evidence adduced by the plaintiffs to prove their case. Neither was there any finding on whether the defendants had rebutted the evidence adduced so as to justify the dismissal of the assertions by the plaintiffs of misrepresentation, fraud or conspiracy to defraud on the part of the defendants.

[37] In the upshot we allow with costs this appeal by the plaintiffs, set aside the judgment of the Court of Appeal and restore the judgment and orders of the learned JC.